Petition

81-921

No.

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOY KESSINGER
LEONARD CASEY
ROYAL CASE - - - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the defendants in a criminal prosecution are deprived of their constitutional rights to confrontation and due process by a prosecutor's appeal to the prejudices and passions of the jury during closing argument.

2. Whether the defendants' Fifth Amendment rights were violated by the trial court's permitting the arresting officer to repeatedly refer to the silence of the defendants after arrest.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

JOY KESSINGER
LEONARD CASEY
ROYAL CASE - - - - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

OPINIONS BELOW

The Judgment of the Bullitt Circuit Court (Appendix A, pp. 15-20) was not reported. The opinion of the Kentucky Court of Appeals (Appendix B, pp. 21-24) and its opinion on the Petition for Rehearing (Appendix C, p. 25) are not reported. The Per Curiam Opinion of the Kentucky Supreme Court (Appendix D, p. 26) will not be reported. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257.

CONSTITUTIONAL PROVISIONS

1. The Fifth Amendment, United States Constitution
2. The Sixth Amendment, United States Constitution
3. The Fourteenth Amendment, United States Constitution

STATEMENT OF THE CASE

On November 29, 1979, the Shepherdsville police responded to a silent alarm at the Southern States Cooperative. Upon arrival in the area, Officer Benjamin Stillwell saw the Movants leave the general area and pursued them. The Movants were apprehended and a bag of tools was recovered from a nearby drainage ditch. These tools were the basis for a charge of possession of burglary tools. A van which was later reported stolen was found parked in the rear parking lot of Southern States Cooperative. The Movants were tried by jury in June, 1980, and convicted of the offense of possession of burglary tools. The Judgment was entered on July 8, 1981, and each Movant was sentenced to twelve months in jail and a fine of $500.00 was imposed.

The Movants appealed the Bullitt Circuit Court judgment to the Kentucky Court of Appeals. On appeal the Movants argued that (1) the Commonwealth's closing argument was improper, in that it appealed to the prejudices and passions of the jury and deprived te Movants of their constitutional right to confrontation and due process of law; and (2) the arresting officer's repeated reference to the Movants' exercise of the Fifth Amendment right to remain silent constituted reversible error.

The Court of Appeals denied Movants' request for oral argument, and affirmed the judgment of the Bullitt Circuit Court stating that the Commonwealth's closing argument was not "particularly prejudicial"

and that counsel failed to object to officer Stillwell's comments regarding the Movants' exercise of their Fifth Amendment rights, and therefore to permit the comments was not error. Petition for Rehearing was denied May 22, 1981. The Supreme Court of Kentucky denied discretionary review September 15, 1981.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court of Kentucky and the Kentucky Court of Appeals Erroneously Concluded That the Commonwealth's Closing Argument Was Not Prejudicial and Not an Improper Appeal to the Prejudices and Passions of the Jury Depriving the Movants of Their Federal Constitutional Right to Due Process of Law.

The closing argument is to be used by the advocate to persuade the jury to adopt his conclusions as justified from the law and facts of the case. While it is well settled that the advocate is granted great latitudes, he may not appeal to the passions and prejudices of the jury with statements not supported by the record.

The closing argument of the Commonwealth was clearly designed to appeal to the prejudices and passions of the jury. The Commonwealth Attorney indicated to the jurors that the Movants were extremely dangerous and implied that they were a threat to their lives and to the life of Officer Stillwell. The Commonwealth stated in speaking of Officer Stillwell:

> . . . but the truth of the matter is there's very little pay for these officers who are out during the night who are protecting our lives and our property. (T.E., pp. 108-109).

The Commonwealth further implied that the Movants were dangerous when he argued as follows:

> . . . He pulled his cruiser into the parking lot at 9:30 at night, and these three (3) defendants, in the dead of night, one of them carrying this leather satchel with these burglary tools, took off running, and he got out of his cruiser and he gave chase over through the fields and apprehended them in that drainage ditch, *he could well have lost his life.* (Emphasis added.) (T.E., p. 109).

Clearly this was improper argument and beyond the scope of the evidence. But the Commonwealth Attorney did not stop here, he continued:

> . . . You know there was a time, and I'm sure most of you Ladies and Gentlemen on the jury can remember it, that here in this county and other places that you could lie down and go to sleep at night, you didn't even have to lock your door.
>
> Mr. Turner: Objection, Your Honor.
>
> The Court: Overruled.
>
> Mr. Waller: You could sleep soundly knowing that no one was going to break in your home, that if you owned a business place that you didn't have to worry about that business place being broken into and your property taken. Well, we're long past that stage now. Because now, people are virtually prisoners in their own homes, in their own places of business. You have to have dead bolts on your doors, some kind of bars on the window of business places, silent alarm systems, the people have to pay for, as citizens, to protect

themselves from thieves. Thieves who believe that whatever belongs to somebody else they have a right to come in and take. Your property is their property. And there is only one way that that's going to be cured. And that is, when these thieves are caught and they're tried, they're going to have to be punished, and if they're given the maximum sentences to be allowed by the law, the next time these three defendants come to Bullitt County, and the next time they think about stealing a van, and breaking in a building . . .

Mr. Turner: Objection, Your Honor.

The Court: Overruled.

Mr. Waller: . . . they'll decide maybe to go to some other county, because they know if they do that in Bullitt County that they're going to be caught, they're going to be tried and they're going to be convicted and they're going to be given the maximum punishment that can be given to them under the law. *If you do that, you'll be doing your duty as citizens and as jurors.* (Emphasis added.) (T.E., pp. 114-115).

The Commonwealth Attorney went far beyond the permitted comment upon the prevalence of crime in the community and appealing to the jury to render a stiff penalty to curb such crime. The Commonwealth indirectly told the jury that conviction of the Movants was a prerequisite to law and order in the community. This argument was previously condemned in *United States* v. *Barker,* 553 F. 2d 1013 (CA, Ky., 1977).

II. The Supreme Court of Kentucky and the Kentucky Court of Appeals Erroneously Concluded That the Movants' Fifth Amendment Rights Were Not Violated by Allowing the Arresting Officers to Make Repeated References to the Silence of the Movants Following Their Arrest.

Officer Benjamin Stillwell, a patrolman for the City of Shepherdsville and the chief witness for the Commonwealth in his direct testimony made repeated reference with the Movants' exercise of their Fifth Amendment rights. Twice in response to direct questions by the Commonwealth Attorney, Officer Stillwell testified as follows (T.E., p. 28):

> Q. Did they say anything to you?
>
> A. No sir. They wouldn't give me their names or anything until we got to the courthouse, then I got their license out of their billfold. I read their rights. They wouldn't sign them. They said they didn't know what was going on.

Officer Stillwell further stated on direct examination (T.E., p. 31):

> Q. Did this defendant who had the license receipt, did he tell you that he had an automobile parked over there somewhere behind an apartment building?
>
> A. No, they wouldn't tell me anything. No, they wouldn't tell me anything.

On cross-examination Officer Stillwell stated that he had advised the Movants of their *Miranda* warning

and that the aforementioned silence was in exercise of their Fifth Amendment rights.

A defendant's post-arrest silence is nothing more than the exercise of his constitutional rights. The defendant's exercise of this right to remain silent after his arrest has been zealously guarded since the Court's decision in *Miranda* v. *Arizona,* 384 U. S. 436, 86 S. Ct. 1602 (1966).

> It is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. (citations omitted)

In *United States* v. *Williams,* 523 F. 2d 406 (2nd Cir., 1975) the Court "assumed" that to admit trial testimony that a defendant refused to answer questions was error. The Court further held that lack of objection by counsel does not excuse the failure of the trial judge to intervene and strike the offending testimony and instruct the jury to disregard it. *United States* v. *Ortiz,* 507 F. 2d 1224 (6th Cir., 1974). *United States* v. *Earl,* 529 F. 2d 1145 (6th Cir. 1976) also demonstrates the Court's desire to guard the constitutional right of the accused to remain silent. As in this case, in *Earl, supra,* the prosecutor asked the arresting officer if the defendant had made any statements before the trial. The trooper replied in the negative. Other references were made to the pre-trial silence of the defendants. The Court recognized that

the comments on the defendants' exercise of their constitutional right to remain silent amounted to constitutional error. The Court also noted that failure on the part of the defense counsel to intervene did not waive the error or excuse the failure of the trial judge to intervene and strike the testimony. See *Garrity* v. *New Jersey,* 385 U. S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967); *Gardner* v. *Broderick,* 392 U. S. 273, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968).

The United States Supreme Court in *Doyle* v. *Ohio,* 426 U. S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976) reversed the conviction of defendants who had been convicted of selling marijuana to undercover officers due to comments of the defendants' exercise of their right to remain silent. In reversing the conviction on the view that the use of the defendant's post arrest silence violated due process the Court held:

> Despite the importance of cross examination, we have concluded that the *Miranda* decision compels rejection of the state's position. The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment rights, see *Michigan* v. *Tucker,* 417 U. S. 433, 443-444, 41 L. Ed. 2d 192, 94 S. Ct. 2357 (1974), require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post arrest silence is insolubly am-

> biguous because of what the State is required to advise the person arrested. Moreover, while it is true that the *Miranda* warnings contain no express assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. (*Ibid,* at 618).

The Kentucky Courts have rigorously preserved the sanctity of the accused's post-arrest silence:

> When a criminal defendant has received Miranda warnings following arrest, his subsequent silence cannot be used to impeach his testimony at trial. *Salisbury* v. *Commonwealth,* 556 S. W. 2d 922, 926 (Ky. App., 1977); *Neimeyer* v. *Commonwealth,* 533 S. W. 2d 218 (Ky., 1976); *Cessna* v. *Commonwealth,* 465 S. W. 2d 283 (Ky., 1971); and *Bradley* v. *Commonwealth,* 261 S. W. 2d 642 (Ky., 1953).

Many decisions have been rendered regarding comments on post-arrest silence. Several of those decisions have held that while error was commented it was a harmless one. *Darnell* v. *Commonwealth,* 558 S. W. 2d 590 (Ky., 1977) set the guidelines for determining harmless error. The Court held that comments on post-arrest silence was harmless error when the prosecutor did not focus on the defendant's silence by repetitive questioning; did not mention it in closing argument; evidence against the defendant was overwhelming; and that the answers obtained established that defendant desired an attorney before making a

statement, which served to negate the inference of guilty by an explanation of his silence. The evidence against the Movants here is not overwhelming and nothing was used to negate the inference of guilt by the exercise of the right to remain silent. Clearly, the comments were substantially prejudicial to the Movants' rights. In *Summitt* v. *Commonwealth,* 550 S. W. 2d 548 (Ky., 1977) the Court of Appeals pointed to two (2) factors to look for in determining prejudicial error; the prosecutor's closing arguments and overwhelming evidence of the defendant's guilt. The evidence of guilt here is not overwhelming and the closing argument of the prosecutor was extremely prejudicial as set forth in Argument I.

While Kentucky Courts have frequently held that comment on post-arrest silence is error it is not an error that is substantially prejudicial to the defendant's right. *Stiles* v. *Commonwealth,* 570 S. W. 2d 590 (Ky., 1977). In *Stiles, supra,* while condemning the practice the Court held that the references to the defendant's silence were not prejudicial citing the follownng test as determinative:

> One of the foremost tests in determining whether an error is prejudicial is a consideration of whether the whole case there is a substantial possibility that the result would be any different. (cites omitted.) (*Id.* at 647).

Since the Supreme Court of Kentucky condemns this practice the only way to prevent its continued use is to adopt the position of the Federal Courts and

other jurisdictions. *Smith* v. *State,* 340 So. 2d 930 (Fla. App., 1976); *Arbogast* v. *State,* 340 So. 2d 1179 (Fla App., 1976); *Thomas* v. *State,* 342 So. 2d 991 (Fla. App., 1977); *Commonwealth* v. *Greco,* 465 Pa. 400, 350 A. 2d 826.

In *Greco, supra,* the Court held that the arresting officer's testimony regarding the defendant's post-arrest silence was highly prejudicial and affirmed the reversal of the trial court's conviction. In ordering the new trial, the Court stated:

> Lay person might conclude that the natural reaction of an innocent person would be a denial of any involvement in the crime charged. (citations omitted) The failure to deny might thus be considered an unnatural reaction unless the accused was in fact guilty. The witness's testimony that the appellant "didn't actually make any statements other than general conversation" necessarily carried the implication that the appellant remained silent and failed to deny his involvement. Such testimony implies an admission of guilt. An admission of guilt constitutes highly prejudicial evidence and cannot be considered harmless error. (*Id.,* at 828).

To permit witnesses to comment on post-arrest silence of a defendant has been frequently held to be error. This practice has been condemned by all appellate courts where the issue has been raised. In some cases, the error has been held to be a harmless one, and the judgment not reversed. However, in all cases the constitutional issue has been given careful con-

sideration to the facts of the individual case and its apparent effect. Numerous cases hold specifically that failure of counsel to object at the time does not waive the error. The Court of Appeals summarily held that it was not error because defense counsel failed to object at the time the statements were made. Case law as cited does not support that conclusion. The prejudicial effects of an officer's comments on the exercise of a defendant's Fifth Amendment rights should be decided on the individual facts of a case and not whether counsel objected at the time the comments were made. To hold otherwise would be to penalize the individual for the exercise of his Fifth Amendment privileges which was outlawed in *Miranda, supra.*

The Movants urge the Court to grant this Writ and provide guidance to the state courts in order to direct the future conduct in evaluation of prosecutor's closing arguments. The Movants further urge the Court to use this opportunity to unify the approach of the various state courts to this fact of the constitutional right to remain silent.

CONCLUSION

A Writ of Certiorari should issue to review the judgment and opinion of the Kentucky Supreme Court.

Respectfully submitted,

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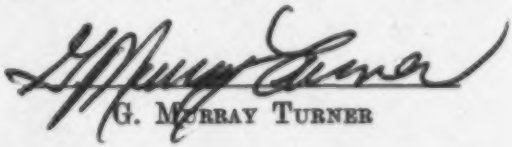
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this 13th day of November, 1981, deposited in the United States Mail, and was mailed to the Hon. Thomas L. Waller, Commonwealth Attorney, 202 Doctors Alley, Shepherdsville, Kentucky 40165.



G. MURRAY TURNER

APPENDIX

BULLITT CIRCUIT COURT

No. 79-CR-051

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

JOY KESSINGER - - - - - - - *Defendant*

JUDGMENT—Entered July 8, 1980

ON THE CHARGE OF:

KRS 511.050 Possession of Burglary Tools

This 27th day of June, 1980, the Defendant, JOY KESSINGER appeared in open court with his attorney, the Honorable G. Murray Turner, and Thomas L. Waller appeared as attorney for the Commonwealth, the court informed the Defendant that he has been found guilty of the crime of possession of burglary tools by the Jury on his plea of not guilty, the court further inquired of the Defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded both Defendant and his counsel an opportunity to make statements in the Defendant's behalf and to present any and all information in mitigation of punishment, and the court further considering the nature of the crime and giving due consideration to probation and parole of this individual, and the court being sufficiently advised, and no sufficient cause being shown why judgment should not be pronounced, IT IS THEREFORE BY THE COURT:

ADJUDGED, that the Defendant is guilty of the crime of possession of burglary tools and his punishment is fixed at

confinement in the Bullitt County Jail for a period of twelve months and a fine in the amount of five hundred dollars ($500.00), plus the cost of this action.

IT IS FURTHER ORDERED that this Defendant be delivered to the custody of the Bullitt County Jailer for the execution of this sentence.

After fixing sentence, the court advised the Defendant of his right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, and that this right could not be abridged on account of the indigency of the Defendant. Pending appeal, bond is allowed in the amount of $5000.00 cash.

WITNESS the hand of the court this 8 day of July, 1980.

(s) C. V. Sanders
Judge, Bullitt Circuit Court

The foregoing Judgment was entered on the 8 day of July, 1980.

(s) Nancy Strange
Clerk, Buillitt Circuit Court

By: (s) R. Duncan, D. C.

The foregoing Judgment and notice of entry was served upon the defendant by mailing a true copy to Hon. G. Murray Turner, attorney of record, postage prepaid, this 8 day of July, 1980.

(s) Nancy Strange
Clerk, Buillitt Circuit Court

By: (s) R. Duncan, D. C.

BULLITT CIRCUIT COURT

No. 79-CR-051

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

LEONARD CASEY - - - - - - - *Defendant*

JUDGMENT—Entered July 8, 1980

ON THE CHARGE OF:

KRS 511.050 Possession of Burglary Tools

This 27th day of June, 1980, the Defendant, LEONARD CASEY appeared in open court with his attorney, the Honorable G. Murray Turner, and Thomas L. Waller appeared as attorney for the Commonwealth, the court informed the Defendant that he has been found guilty of the crime of possession of burglary tools by the Jury on his plea of not guilty, the court further inquired of the Defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded both Defendant and his counsel an opportunity to make statements in the Defendant's behalf and to present any and all information in mitigation of punishment, and the court further considering the nature of the crime and giving due consideration to probation and parole of this individual, and the court being sufficiently advised, and no sufficient cause being shown why judgment should not be pronounced, IT IS THEREFORE BY THE COURT:

ADJUDGED, that the Defendant is guilty of the crime of possession of burglary tools and his punishment is fixed at

confinement in the Bullitt County Jail for a period of twelve months and a fine in the amount of five hundred dollars ($500.00), plus the cost of this action.

IT IS FURTHER ORDERED that this Defendant be delivered to the custody of the Bullitt County Jailer for the execution of this sentence.

After fixing sentence, the court advised the Defendant of his right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, and that this right could not be abridged on account of the indigency of the Defendant. Pending appeal, bond is allowed in the amount of $5000.00 cash.

WITNESS the hand of the court this 8 day of July, 1980.

(s) C. V. Sanders
Judge, Bullitt Circuit Court

BULLITT CIRCUIT COURT

No. 79-CR-051

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

ROYAL C. CASEY - - - - - - - *Defendant*

JUDGMENT—Entered July 8, 1980

ON THE CHARGE OF:

KRS 511.050 Possession of Burglary Tools

This 27th day of June, 1980, the Defendant, ROYAL C. CASEY appeared in open court with his attorney, the Honorable G. Murray Turner, and Thomas L. Waller appeared as attorney for the Commonwealth, the court informed the Defendant that he has been found guilty of the crime of possession of burglary tools by the Jury on his plea of not guilty, the court further inquired of the Defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded both Defendant and his counsel an opportunity to make statements in the Defendant's behalf and to present any and all information in mitigation of punishment, and the court further considering the nature of the crime and giving due consideration to probation and parole of this individual, and the court being sufficiently advised, and no sufficient cause being shown why judgment should not be pronounced, IT IS THEREFORE BY THE COURT:

ADJUDGED, that the Defendant is guilty of the crime of possession of burglary tools and his punishment is fixed at

confinement in the Bullitt County Jail for a period of twelve months and a fine in the amount of five hundred dollars ($500.00), plus the cost of this action.

IT IS FURTHER ORDERED that this Defendant be delivered to the custody of the Bullitt County Jailer for the execution of this sentence.

After fixing sentence, the court advised the Defendant of his right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, and that this right could not be abridged on account of the indigency of the Defendant. Pending appeal, bond is allowed in the amount of $5000.00 cash.

WITNESS the hand of the court this 8 day of July, 1980.

(s) C. V. Sanders
Judge, Bullitt Circuit Court

OPINION RENDERED: APRIL 3, 1981; 2:00 P.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 80-CA-1830-MR

JOY KESSINGER
LEONARD CASEY and
ROYAL CASEY - - - - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Bullitt Circuit Court
Honorable C. V. Sanders, Judge
Criminal Action No. 79-CR-051

AFFIRMING

BEFORE: HAYES, CHIEF JUDGE, LESTER and MCDONALD, Judges.

LESTER, JUDGE. This is an appeal from a judgment of the Bullitt Circuit Court based upon a jury verdict finding the appellants guilty of the crime of possession of burglary tools. Appellants were sentenced to confinement in the county jail for a period of twelve months, plus a fine of $500 and costs.

Upon appeal, appellants advance two arguments. First, appellants submit that the closing argument of the Commonwealth's attorney was improper and deprive them of their constitutional right to confrontation and due process of law because it was an appeal to the prejudices and passions of the jury. Appellants cite two instances from

the prosecutor's closing statement which they felt to be particularly prejudicial. In the first quote, the prosecutor refers to the relationship between the people and the police force and how we often don't appreciate the fact that officers "are out protecting our lives and protecting our property." We would point out that when this statement was made no objection was entered by defense counsel. As for the second statement, to which there was a timely objection, the prosecutor was commenting upon the need that most persons have to feel secure in their homes and businesses, such that they are employing all measure of security devices i.e. dead bolts, bars on windows, silent alarms, for protection.

We do not dispute appellants' cited authority for their position, but we do not believe that the Commonwealth attorney's closing argument was particularly prejudicial.

> Much latitude is of necessity allowed an attorney in the presentation of his case, the only limitations being such as require him to confine himself to the facts introduced in evidence, and the fair and reasonable deductions and conclusions to be drawn therefrom, and the application of the law, as given by the court to the facts proven. Controlled, regulated, and bounded alone by these limitations an advocate may, with perfect propriety, appeal to the jury with all the power, force and persuasiveness which his learning, skill, and experience enable him to command, and of this character of argument the accused may not complain, even though he feels that his conviction may be traceable more directly to the argument of counsel than to the facts proven. *Koonce* v. *Commonwealth*, Ky., 452 S. W. 2d 822, 826 (1970), *quoting Lewis* v. *Commonwealth*, 307 Ky. 733, 212 S. W. 2d 269 (1948).

Also, it is well-recognized that it is not improper for a prosecutor in a closing statement to comment upon the prevalence of crime in a community and to plead for the jury to render stiff penalties to curb such crime. *Greer* v. *Commonwealth,* Ky., 455 S. W. 2d 555 (1970). We think it significant, as noted by the appellee, that on the two charges which went to the jury, possession of burglary tools and theft of property over $100, the jury convicted appellants only on the first count. *Cf. Ferguson* v. *Commonwealth,* Ky., 512 S. W. 2d 501 (1974) (the jury fixed the minimum sentence on a rape charge, thus showing that they were not prejudiced by prosecutor's statements).

Appellants' second assertion of error involves the testimony of the arresting officer. Specifically, on two occasions, this officer was asked by the prosecutor, with regards to the actual arrest, whether the appellants said anything to him. In both instances, the witness replied in the negative. Appellants submit that this comment upon their refusal to talk to police constituted a violation of due process. Defense counsel failed to object to either statement at the time that it was made. In the absence of an objection or other prompt request for relief, it was not error to permit a police officer to testify that a defendant made no statement following the giving of his *Miranda* rights. *Summit*

v. *Commonwealth*, Ky. App., 570 S. W. 2d 548 (1977); *Stiles* v. *Commonwealth*, Ky. App., 570 S. W. 2d 645 (1978); RCr 9.22.

The judgment of the trial court is affirmed.

ALL CONCUR.

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COURT OF APPEALS OF KENTUCKY

No. 80-CA-1830-MR

JOY KESSINGER,
LEONARD CASEY and
ROYAL CASEY - - - - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Bullitt Circuit Court
Honorable C. V. Sanders, Judge
Criminal Action No. 79-CR-051

ORDER DENYING PETITION FOR REHEARING

BEFORE: HAYES, Chief Judge, LESTER and MCDONALD, Judges.

The Court, having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: MAY 22, 1981

(s) John P. Hayes
Chief Judge, Court of Appeals

SUPREME COURT OF KENTUCKY

81-SC-391-D
(80-CA-1830-MR)

JOY KESSINGER,
LEONARD CASEY and
ROYAL CASEY - - - - - - - - *Movants*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

Bullitt Circuit Court
#79-CR-051

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of Joy Kessinger, Leonard Casey and Royal Casey for a review of the decision of the Court of Appeals is denied.

ENTERED September 15, 1981.

(s) John S. Palmore
Chief Justice

BULLITT CIRCUIT COURT

79-CR-051

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

JOY KESSINGER,
LEONARD CASEY and
ROYAL CASEY - - - - - - *Defendants*

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

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BENJAMINE STILLWELL, being duly sworn, testified as follows:

* * * * * * *

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2. Did you have your light on at that time?

A. No, sir. I did go up 61 with no headlights at all I was trying to sneak up. But, before I got there, I turned them on, yes.

3. Did you say anything to them when you saw them running across the . . . away from Southern States?

A. No, it wouldn't have done any good. So I just jumped out and went behind them. I guess they thought I have give up until I got behind them over . . .

Mr. Turner: Objection, Your Honor, to what the policeman thought they thought or whatever.

The Court: Over rule that objection.

4. At the time that . . . did you walk up behind these defendants as they were kneeling down?

A. Yes, sir, I did.

5. Were they in this drainage ditch or sewer ditch?

A. No, sir, they were close to it, where the bushes were, yes, by the junk yard.

6. Did they say anything to you?

A. No, sir. They wouldn't give me their names or anything until we got to the Court House, then I got their license out of their billfold. I read their

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rights. They wouldn't sign them. They said they didn't know what was going on.

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Redirect Examination by Mr. Waller

Q. 1. Did this defendant who had the license receipt, did he tell you that he had an automobile parked over there somewhere behind an apartment building?

A. No, they wouldn't tell be anything. No. They wouldn't tell me anything.

Mr. Waller: That's all.

Recross-examination by Mr. Turner

Q. 1. You advised them that you were charging them with a crime, did you not, Officer Stillwell?

A. Yes, I did.

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2. Okay. And you advised them at that time that they had a right to a lawyer and remain silent and all that?

A. Right. That's right.

3. You told them about talking to you, did you not?

A. Yes, I did. I always do that.

4. Okay. And they chose to exercise that right, is that correct?

A. They wouldn't tell me anything.

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The Court: Mr. Waller, do you have closing argument for the Commonwealth?

Mr. Waller: If it please the Court, Mrs. Strange, Mr. Turner, Ladies and Gentlemen of the jury, first of all I would like to express by appreciation to you Ladies and Gentlemen of the jury for sitting as jurors in this trial. I know and you know that as you were being questioned on voir dire and by raising your hand and indicating that you could not be a fair and impartial juror in this case, you could have been excused. But, you did not do that. And you're sitting as jurors in this case as citizens of this county to decide the guilt or innocence of these defendants, based on the evidence before you. I want to express my appreciation and thanks to Officer Stillwell. Ordinarily as citizens the only time that we come in contact with the police is when they stop us and give us a traffic citation, and we don't think very much of the police for doing it. But, the truth of the matter is there's very little pay for these officers who are out during the night who are

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protecting our lives and protecting our property. When you stop and think of the evidence in this case, the fact that when Officer Stillwell was advised by the dispatcher that the silent alarm had gone off at Southern States and when he pulled his cruiser into that parking lot at 9:30 at night, and these three defendants, in the dead of night, one of them carrying this leather satchel with these burglary tools, took off running, and he got out of his cruiser and he gave chase over through the fields and apprehended them in that drainage ditch, he could well have lost his life. So, I do want to say thanks to him and all the other police who were out there doing their duty. As I say, working long hours and there's very little pay. Stop and think of this. The criminals, they pick the time and they

pick the place and they pick the victim. It's up to the police officer to solve the crime once it's been committed. They talk about having a witness come in here from Best Western, when you go out and steal a van at nine o'clock at night, you're not going to have any witness come in here and testify that they saw the three take the van. Now you heard on cross examination in this case talk about an automobile that these defendants

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• • • The theft of the van . . . if you believe from the evidence that you heard in

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this case these defendant stole that van, they're guilty. Of theft. And it is your duty, under the law, to find them guilty, fix the punishment at the maximum of five years in the penitentiary. Unfortunately that is the maximum that you can give them for the theft of this van. When you consider the circumstances that are involved here, I urge you to go into that jury room and give the maximum that you can give under both of these sentences. You know there was a time, and I'm sure most of you Ladies and Gentlemen on the jury can remember it, that here in this county and other places that you could lie down and go to sleep at night, you didn't even have to lock your door.

Mr. Turner: Objection, Your Honor.

The Court: Overruled.

Mr. Waller: You could sleep soundly knowing that no one was going to break in your home, that if you owned a business place that you didn't have to worry about that business place being broken into and your property taken Well, we're long past that stage now. Because now, people are virtually prisoners in their own homes, in their places

of business. You have to have dead bolts on your doors, some kind of bars on the window of business places,

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silent alarm systems, the people have to pay for, as citizens, to protect themselves from thieves. Thieves who believe that whatever belongs to somebody else they have a right to come in and take. Your property is their property. And there is only one way that that's going to be cured. And that is, when these thieves are caught and they're tried, they're going to have to be punished. And if they're punished, and if they're given the maximum sentences to be allowed by the law, the next time these three defendants come to Bullitt County, and the next time they think about stealing a van, and breaking in a building . . .

Mr. Turner: Objection, Your Honor.

The Court: Overruled.

Mr. Waller: . . . they'll decide maybe to go to some other county, because they konw if they do that in Bullitt County that they're going to be caught, they're going to be tried and they're going to be convicted and they're going to be given the maximum punishment that can be given to them under the law. If you do that, you'll be doing your duty as citizens and as jurors. Thank you.

Thereupon, the jury retires to the jury room to deliberate a verdict.

* * * * * * *

Opposition

Office - Supreme Court, U.S.
FILED
JAN 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-921

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOY KESSINGER
LEONARD CASEY
ROYAL CASE - - - - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS OF LAW PRESENTED FOR REVIEW

1. Were petitioners deprived their federal constitutional rights to confrontation and due process of law by the prosecution's closing argument?

2. Were petitioners' Fifth Amendment rights violated by references at trial to the petitioners' silence following their arrest?

LIST OF ALL PARTIES

1. Petitioners are Joy Kessinger, Leonard Casey, and Royal C. Casey. Counsel for petitioners is Hon. G. Murray Turner.

2. Respondent is the Commonwealth of Kentucky. Counsel for respondent are Hon. K. Gail Leeco and Hon. John H. Gray.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-921

JOY KESSINGER,
LEONARD CASEY,
ROYAL CASEY - - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

May it please the Court:

CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN COURTS BELOW

Commonwealth of Kentucky v. Joy Kessinger, Leonard Casey, Royal C. Casey, Bullitt Circuit Court, No. 79-CR-051, Judgment entered July 8, 1980 on the charge of KRS 511.050 Possession of Burglary Tools.

Kessinger, et al. v. Commonwealth, Court of Appeals of Kentucky, No. 80-CA-1830-MR, Opinion rendered April 3, 1981. Not To Be Published.

Kessinger, et al. v. Commonwealth, Court of Appeals of Kentucky, No. 80-CA-1830-MR, Order denying Petition for Rehearing. Entered May 22, 1981.

Kessinger, et al. v. Commonwealth, Supreme Court of Kentucky, No. 81-SC-391-D, Order denying Motion for Discretionary Review. Entered September 15, 1981.

GROUNDS FOR JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS

1. THE FIFTH AMENDMENT, UNITED STATES CONSTITUTION

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. THE SIXTH AMENDMENT, UNITED STATES CONSTITUTION

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. KENTUCKY RULE OF CRIMINAL PROCEDURE, RCr 9.22

Rule 9.22 Objections, Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and on request of the court, his grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

STATEMENT OF THE CASE

This petition arises from petitioners' convictions for possession of burglary tools.

Petitioners first came to the attention of the Commonwealth on November 29, 1979 when a silent alarm

alerted the Shepherdsville police of an attempted burglary at the Southern States Cooperative. In response to that alarm, a police car was dispatched to the scene and on arrival, the officer saw three persons rapidly departing the area by foot. The officer gave chase in a similar manner, over fields and through ditches, which chase culminated in the apprehension of the three petitioners and the seizure of certain tools. A stolen van was also found parked next to the Southern States Building.

Petitioners were thereafter indicted in December, 1979 on charges of attempted second degree burglary, possession of burglar's tools and theft by unlawful taking over $100.00 of a van. Petitioners were tried by a jury in June, 1980. At trial the trial court directed a verdict in petitioners' favor on the charge of attempted burglary. The charges of possession of burglar's tools and theft by unlawful taking were submitted to the jury. The jury returned a verdict of guilty on the charge of possession of burglar's tools. Petitioners were found not guilty of theft by unlawful taking. Judgment was entered on July 8, 1981 and petitioners were each sentenced to 12 months in jail and fined $500.00.

Petitioners thereafter appealed this judgment to the Court of Appeals of Kentucky. On appeal petitioners argued: (1) that the Commonwealth's closing argument was an improper appeal to the prejudices and passions of the jury which deprived petitioners of their constitutional right to confrontation and due process of law; and (2) that Officer Benjamin Still-

well's repeated reference to petitioners' exercise of the Fifth Amendment rights constituted reversible error.

The Court of Appeals rejected petitioners' arguments and in a thorough and well reasoned Opinion affirmed the judgment of the Bullitt Circuit Court.

Petitioners thereafter sought a rehearing on their appeal. Petitioners' motion for rehearing was denied.

Petitioners next sought discretionary review of their appeal from the Supreme Court of Kentucky. Petitioners' motion for discretionary review was also denied.

Petitioners now seek a writ of certiorari from this Court.

REASONS FOR DENYING REVIEW

Although petitioners seek Supreme Court review of their convictions they fail to show that the state courts of Kentucky either decided a federal question of substance not heretofore determined by this Court or decided a federal question of substance in a way not in accord with applicable decisions of this Court. (United States Supreme Court Rule 19). Neither have petitioners shown that the decisions of the Kentucky State Appellate Courts will have adverse consequences for other litigants or in other situations. Nor have petitioners explained why it is vital that the questions involved be decided finally by this Court.

The reasons advanced by petitioner for this Court granting review are:

1. So that this Court may provide guidance to the state courts in order to direct the future conduct in evaluation of prosecutor's closing arguments; and

2. So that this Court may unify the approach of the various state courts to the fact of the constitutional right to remain silent.

Although the above reasons are advanced by petitioners, these reasons are not supported by argument. Petitioners' arguments do no more than set forth the claim that the decisions below were in error. Since petitioners have advanced no important reasons why this Court should grant certiorari nor even supported their reasons with relevant argument and since the decisions below turned on their own facts and will affect no other litigants, review should be denied.

ARGUMENTS

1. Petitioners first argue that the Supreme Court of Kentucky and the Kentucky Court of Appeals erroneously concluded that the Commonwealth's closing argument was not prejudicial and not an improper appeal to the prejudices and passions of the jury depriving petitioners of the federal constitutional right to due process of law.

Petitioners' argument is that the courts of Kentucky erred in deciding this issue; that and nothing more. Petitioners neither point to the existence of a conflict, nor raise an important question that would call for this Court to exercise its supervisory power.

Petitioners allege only that the courts below erred. The Commonwealth submits that even if petitioners' arguments were successful in demonstrating that the decisions below were erroneous, petitioners would not have successfully met their burden of showing why review should be granted. Certiorari should only be granted when it is demonstrated that it is important for this Court to review a decision. Petitioners have failed totally to demonstrate the importance of Supreme Court review. For these reasons review should not be granted.

On its merits, petitioners' first argument is that the Commonwealth's closing argument was an improper appeal to the prejudices and passions of the jury.

The Commonwealth submits that if its closing argument was error, it was harmless error in that the outcome of the case would have been the same even had the objected-to portion of the closing argument not been made.

It will be remembered that petitioners were indicted on charges of attempted second-degree burglary, possession of burglars' tools and theft by unlawful taking. Petitioners were convicted only on the possession of burglars' tools. If the Commonwealth's closing argument was an attempt to appeal to the prejudices and passions of the jury, it was an unsuccessful attempt that was not inflammatory enough to induce the jury to convict petitioners on any charge other than the one charge on which there was overwhelming and unchallenged evidence. For these rea-

sons the Commonwealth's closing argument could not have improperly influenced the jury.

2. Petitioners' second argument is that the Supreme Court of Kentucky and the Kentucky Court of Appeals erroneously concluded that petitioners' Fifth Amendment rights were not violated when the arresting officer was allowed to make repeated references to petitioners' post-arrest silence.

Once again petitioners' argument is nothing more than that the courts of Kentucky erred in deciding this issue. Petitioners have, therefore, once again, not successfully met their burden of showing why review should be granted. Since petitioners have failed to demonstrate the importance of Supreme Court review, review should not be granted.

On the merits, petitioners' argument seems to be that it was error for the trial court to admit testimony that petitioners refused to answer questions following their arrest.

Respondent submits that petitioners' argument was not preserved for appellate review and that any error in admitting testimony concerning petitioners' post-arrest silence was harmless.

The record shows that the "repeated references" to petitioners' post-arrest silence occurred during the testimony of Officer Benjamin Stillwell, a patrolman for the city of Shepherdsville and the chief witness for the Commonwealth. Officer Stillwell was questioned by the Commonwealth Attorney and testified as follows:

Q. Did they say anything to you?

A. No sir. They wouldn't give me their names or anything until we got to the courthouse, then I got their license out of their billfold. I read their rights. They wouldn't sign them. They said they didn't know what was going on. (T.E., p. 28).

Q. Did this defendant who had the license receipt, did he tell you that he had an automobile parked over there somewhere behind an apartment building?

A. No, they wouldn't tell me anything. No, they wouldn't tell me anything. (T.E., p. 31).

No objection was made at trial to Officer Stillwell's testimony.

In Kentucky an issue is not considered preserved for appellate review unless a timely objection is made at trial. RCr 9.22. Kentucky courts have consistently enforced this contemporaneous objection rule. *Edmonds* v. *Commonwealth,* Ky., 586 S. W. 2d 24 (1979); *Murtaugh* v. *Commonwealth,* Ky., 579 S. W. 2d 619 (1979); *Veach* v. *Commonwealth,* Ky., 572 S. W. 2d 417 (1978); *Poteet* v. *Commonwealth,* Ky., 556 S. W. 2d 893 (1977); *Summitt* v. *Commonwealth,* Ky., 550 S. W. 2d 548 (1978); *Cane* v. *Commonwealth,* Ky. App., 556 S. W. 2d 902 (1977), certiorari denied 437 U. S. 906; *Webster* v. *Commonwealth,* Ky., 508 S. W. 2d 33 (1974), certiorari denied 419 U. S. 1070, rehearing denied 420 U. S. 913; *Ohio River Sand Company* v. *Commonwealth,* Ky., 467 S. W. 2d 347 (1971); *Bush* v. *Commonwealth,* Ky., 457 S. W. 2d 495 (1970); *Jackson* v. *Commonwealth,* Ky., 450 S. W. 2d 244

(1970); *George* v. *Commonwealth,* Ky., 445 S. W. 2d 447 (1969); *Patrick* v. *Commonwealth,* Ky., 436 S. W. 2d 69 (1968); *Arnold* v. *Commonwealth,* Ky., 433 S. W. 2d 355 (1968).

In the case at bar, the Kentucky Court of Appeals again enforced Kentucky's contemporaneous objection rule and found that error had not occurred because no objection had been made. As stated by the Court:

> Appellants' second assertion of error involves the testimony of the arresting officer. Specifically, on two occasions, this officer was asked by the prosecutor, with regards to the actual arrest, whether the appellants said anything to him. In both instances, the witness replied in the negative. Appellants submit that this comment upon their refusal to talk to police constituted a violation of due process. Defense counsel failed to object to either statement at the time that it was made. In the absence of an objection or other prompt request for relief, it was not error to permit a police officer to testify that a defendant made no statement following the giving of his *Miranda* rights. (Citations omitted.)

This Court has recognized that it is not inconsistent with the United States Constitution for states to enforce "contemporaneous objection rules" that require timely objection at trial or waiver of the objection. *Wainwright* v. *Sykes,* 433 U. S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977). This Court has also recognized that a state court's enforcement of its "contemporane-

ous objection rule" amounts to an independent and adequate state procedural ground which prevents direct review by this Court. *Wainwright* v. *Sykes, supra,* at 433 U. S. 86-88.

The Commonwealth submits that Kentucky RCr 9.22 is the type of "contemporaneous objection rule" envisioned by this Court's Opinion in *Wainwright.* Therefore, no constitutional error was committed by the Kentucky Court of Appeals enforcing the rule. This Court, then, has no grounds for reviewing the alleged error regarding the issue of references made to petitioners' post-arrest silence.

The Commonwealth further submits that the testimony of Officer Oliver regarding petitioners' post-arrest silence if error, was harmless error. Petitioners were indicted on charges of attempted second degree burglary, possession of burglar's tools and theft by unlawful taking. Petitioners were convicted only on the possession of burglar's tools. The evidence against petitioners on the possession of burglar's tools charge was overwheming and unchallenged. In view of this overwhelming and unchallenged evidence, references to petitioners' refusal to answer questions could not possibly have had any effect on the outcome of the case. Even had testimony not been introduced regarding petitioners' silence the jury's decision would have been the same.

CONCLUSION

Since petitioners have failed to demonstrate why review should be granted, the Commonwealth respectfully requests that this petition be dismissed.

Respectfully submitted,

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[Ms. Leeco for Service, United States Supreme Court Rule 33.2(7)]
John H. Gray
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Assistant Attorney General
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CERTIFICATE OF SERVICE

I, K. Gail Leeco, Assistant Attorney General for the Commonwealth of Kentucky and Member of the Bar of the United States Supreme Court, certify pursuant to UNITED STATES SUPREME COURT RULE 28.5(b) that one copy (typewritten document, see UNITED STATES SUPREME COURT RULE 28.3) of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI, ~~as well as the Appendix to that Response,~~ was served on Hon. G. Murray Turner, 440 South Seventh Street, Suite 300, Louisville, Kentucky 40203, Counsel for Petitioners, by depositing copy of same in the United States Mail, duly addressed and stamped, on this, the 4TH day of ~~December, 1981~~ January, 1982.

K. Gail Leeco

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Assistant Attorney General for the Commonwealth of Kentucky and Member of the Bar of the United States Supreme Court